Supreme Court, U.S.
FILED
MAY 7 - 2010

No. 09-1052 CAPITAL CASE

In The
Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Third District

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

A. The Ohio Court's *Brady* Analysis Is The Same As The Analysis This Court Rejected in *Strickler*. 2

B. This New Evidence Could Not Have Been Raised "Years Before" 2

1. New evidence implicating Melton 3

2. New evidence that Nurse Gimmets does not exist. 4

C. The New Evidence Is Material 5

1. New Evidence Regarding Melton 6

2. New Evidence That Nurse Gimmets Does Not Exist 8

3. The remaining evidence against Keith is weak. 9

CONCLUSION 11

APPENDIX

Appendix 1: Handwritten Notes [000106-0000111] (fold-out exhibit) 1a

TABLE OF AUTHORITIES

CASES

Banks v. Dretke,
540 U.S. 668 (2004) 4

Strickler v. Greene,
527 U.S. 263 (1999) 1, 2

REPLY

The State raises three points: (1) the lower court conducted a proper *Brady* analysis; (2) the new evidence could have been discovered years earlier; and (3) the new evidence is not "material." Each point is mistaken or simply false.

First, the lower court's *Brady* analysis was just like that rejected by this Court in *Strickler v. Greene*, 527 U.S. 263, 290 (1999). Keith relied heavily on *Strickler* in his Petition; the State does not discuss it. *Second*, the new evidence could not have been discovered before 2007—it was suppressed by the State and first uncovered in 2007. *Third*, the State itself explains in detail factors suggesting that *Melton* committed this horrific crime against Rudel Chatman's family. The new evidence that Melton was actually paid to cripple Rudel just two weeks before the shootings is "material" to that inquiry. Moreover, the State suggests that the fake-nurse revelation is also not material—in large part because another nurse called the police to say that the victim identified Keith as the shooter. But that nurse's testimony was contradicted by the victim himself, as well as by the victim's hospital records.

This is not simply about the proper *Brady* analysis showing a reasonable probability that the new evidence would have led to a different outcome. It is about the reasonable probability that Ohio will execute an innocent man on September 15, 2010. Certiorari should be granted.

A. The Ohio Court's *Brady* Analysis Is The Same As The Analysis This Court Rejected in *Strickler*.

As noted in the Petition, the lower court in *Strickler* "recited the proper materiality test," but then also relied on the improper sufficiency analysis to dispose of the *Brady* claim. Pet. 11. This Court expressly rejected that approach. Here, the State—without mention of *Strickler*—relies on the same rejected reasoning: "To be sure," the State says, "the Court of Appeals did *mention* the sufficiency of the evidence, but only as a passing aside *after* it had rejected Keith's *Brady* claim." Opp. 7 (emphases in Opp.).

Indeed, the lower court here did nothing more than recite the materiality test. With no actual analysis of materiality, the lower court's glaring reference to the sufficiency of the evidence is hardly "obiter dicta"—it is the basis for denying Keith's claim. That contradicts *Strickler*.

B. This New Evidence Could Not Have Been Raised "Years Before"

Keith did not discover his new evidence in 2004 and "wait[] three years" to file it. Opp. at 8. Although the evidence from Keith's 2004 postconviction relief petition was also exculpatory, it was not the new evidence on which Keith's new-trial motion was based and is not the subject of this petition. Rather, as noted below, this new evidence was discovered in 2007 and acted upon immediately.

1. New evidence implicating Melton

In July 2007, Keith discovered the new evidence concerning Melton (e.g., that he was paid to harm Chatman and that he wore a particular mask) in the files of the Ohio Pharmacy Board. His new-trial motion, based in part on that evidence, was filed on August 1, 2007. There was no delay.

This evidence could not reasonably have been discovered earlier. The Pharmacy Board is not a place to look for evidence concerning a criminal case, as its purpose is to regulate pharmacies and "act efficiently, consistently, and impartially in the public interest to pursue optimal standards of practice through communication, education, legislation, licensing, and enforcement." *pharmacy.ohio.gov/mission.htm*. Nonetheless, Keith's counsel took a shot in the dark and made a public records request to the Pharmacy Board regarding the Meltons. *See* Cole Aff. at ¶ 2 ("I received a public records request from Rachel Troutman on July 2, 2007, for records involving Bruce and Rodney Melton and their pharmacy burglaries") (emphasis added). It paid off.

No doubt Keith was aware of the Meltons' involvement in the pharmacy burglaries and that they were being prosecuted. But knowing that the Meltons faced charges is entirely different than knowing that, during the investigation surrounding those charges, Rodney Melton told another of his plan to commit the crime for which Keith was on trial.

In any event, it is the State's burden to provide the defendant with any exculpatory evidence in its possession. As this Court has said, "A rule thus

declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Simply put, the State possessed this evidence and failed to turn it over—at the risk of not only leading the wrong person to be executed, but of leaving the real killer at large.

2. New evidence that Nurse Gimmets does not exist.

Similarly, Keith cannot be blamed for the State's suppression of the newly discovered fact that there was no Nurse Gimmets. The prosecutor elicited testimony from Bucyrus Police Officer John Stanley regarding where he "first hear[d] the name Kevin Keith." Tr. 226. Stanley answered that it was from Richard Warren's nurse, "Amy Gimmets." *Id.* Stanley re-iterated this later on in the trial: he "spoke with a nurse by the name of Amy Gimmets," it was "from her" that he first heard the name "Kevin" used, and that conversation occurred "shortly after noon." *Id.* at 770-71, 774. By repeatedly providing the defense with the wrong name, the State suppressed the true identity of the nurse who called Stanley. Defense counsel had no reason to believe that Captain Stanley would testify falsely about the substance of his conversation with Warren's nurse. A veteran police officer perjured himself, and Keith cannot be faulted for failing to uncover the State's lies earlier.

Furthermore, ten years ago, former habeas counsel requested discovery with regard to "the nurse who apparently confirmed Warren's identification." *Keith v. Mitchell*, 1:99-cv-00657, Dkt. 38. But the district court

denied that request, finding that Keith failed to show good cause. No one from the State spoke up.

The State complains about the 16 years it has taken Keith to raise the claims based on his newly discovered evidence. But at no point during those 16 years did the State provide Keith with that evidence. If the State wished to expedite matters, it should have followed its constitutionally mandated duty to disclose all favorable, material evidence.

C. The New Evidence Is Material

The new evidence regarding Melton and "Nurse Gimmets" is material. As noted in the Petition, the jury had reason to consider Melton as the shooter. Indeed, the State's Brief in Opposition acknowledges in detail evidence pointing to him:

> 1) Melton owned a light colored vehicle, similar in description to the shooter's vehicle. Opp. at 4.
>
> 2) Part of the license plate number for Melton's vehicle was "043." *Id.*
>
> 3) Melton quickly arrived at the crime scene. *Id.*
>
> 4) Melton already knew what type of bullets were used in the shooting before talking with police. *Id.*
>
> 5) Melton appeared at the hospital a short time later to inquire about the surviving victims' conditions. *Id.*

6) Melton was involved in the drug-trafficking bust where Rudel Chatman was the police informant. *Id.*

7) Melton told the Chatman family that the shootings occurred as a result of Rudel's "snitching." *Id.*

8) Melton had a significant motive for punishing Chatman. *Id.* at 11.

But why didn't the jury conclude that Melton was the shooter? Two reasons: Melton did not appear to have any particular greater motivation than some others to go after Chatman or his family, and, crucially, nurses tending to Warren appeared to relay that Warren identified Keith. The new evidence eviscerates these points.

1. New Evidence Regarding Melton

A man was paid $15,000 to "cripple" someone to send a brutal message about snitching, and two weeks later, the target's family was brutally shot. The State claims that this is not material because the target (Chatman) was not actually among those shot. Suffice it to say, this evil act would certainly send the message such a payment bought.

We are no longer talking about a theoretical reason why Melton would have done this; we are talking about an actual *contract* to commit the crime. It exemplifies "material" new evidence. It is the motive the jury never knew.

But the motive doesn't stop there. The State claims that "the Reeves children were shot for no other reason than their misfortune of being at the apartment." Opp. at 2. *Keith* had no motive to shoot the Reeves' children, though the same cannot be said for Melton.

The Pharmacy Board report shows that the Meltons had to worry about the information that Demetrius Reeves had regarding their pharmacy burglary ring. Reeves was the father of the two children who were shot, and he was an active participant in the pharmacy burglaries. Pharmacy Board rpt, pp. 29-30. Reeves "had driven on several pharmacy breaking and enterings," and he told the police that "the Meltons had probably done around 50 B&E's since their return to Ohio from prison." *Id.* at 30. Reeves had intimate knowledge of the Meltons' "racket," and he became a witness against the Meltons for the pharmacy burglary ring. *Id.* This new evidence shows that Melton had the motive to send a message to both Chatman *and* Reeves.

The State also challenges the importance of the mask evidence. Opp. at 12 But the State ignores the peculiar type of mask worn by the shooter in this case. Quanita Reeves and Richard Warren both recalled that the man who shot them wore a mask that covered his mouth. Tr. 348, 716. The pharmacy-ring informant told police that it was Melton's habit to wear a mask that covers his mouth because he has a gap between his front teeth.

In short, the State claims that "most of [the new evidence] is cumulative with evidence that was introduced." Opp. at 6. At this point, however, the additional evidence of a third party's guilt ceases being

"cumulative" and starts being exactly what it is—proof that Melton is responsible for the Bucyrus Estates shootings.

2. New Evidence That Nurse Gimmets Does Not Exist

The State says it is also immaterial that there is no "Amy Gimmets" and that the real nurse (Petryk) explained that Warren never provided the name "Kevin." The State notes that another nurse, John Foor, received the name "Kevin." But that is not true.

Foor's testimony is contradicted by Warren's medical records and by Warren himself. Foor was Warren's nurse until 7 a.m. on February 14, 1994, but Warren reported to hospital security at 1 p.m. that day that the shooter's name was "still unknown." Security Guard rpt., *Keith v. Mitchell*, 1:99-cv-00657, Dkt. 57-1. In other words, eight hours *after* Foor claims that Warren wrote "Kevin," Warren told security that he did not know the shooter's name.

Further, Foor claimed that Warren "wrote out" that he "felt the first name of the person was Kevin, that's all he knew." Tr. 778. Warren, however, testified that he did *not* write down the name "Kevin." Tr. 368.

Foor testified that he informed the Bucyrus Police Department about what Warren had written. Foor then testified that he threw the notes away since it "was just on a piece of scratch paper." *Id.* at 779. In April 2004, however, Keith discovered that scratch paper as a result of a public records request to the Bucyrus Police Department. While "Kevin" is indeed written down on the paper, it is written in a

handwriting different than the other handwritten words that are clearly attributable to Warren. Warren's handwriting is nearly illegible, and the words he wrote were haphazardly strewn across the pages (as opposed to writing from side-to-side). *See* Reply App. 1a. But "Kevin" is written clearly – and it is written in what appears to be the same handwriting as the words "Captain Stanley," "Bucyrus Police," and the phone number for the Bucyrus Police Department. *Id.* (page marked 0111).

These notes were part of the 2004 postconviction relief petition referenced by the State. Despite the fact that the Bucyrus Police possessed these notes, the State never bothered to correct Foor's testimony that they had been destroyed.

3. The remaining evidence against Keith is weak.

The new evidence is particularly material in light of the shaky remaining evidence. The State claims that the "police later discovered tire prints and a partial license plate imprint of "043" from the snow bank, and were able *to match* the vehicle to a 1982 Oldsmobile Omega, operated by Melanie Davidson, Keith's girlfriend." Opp. at 3 (emphasis added). This is an exaggeration.

A photograph of the 1982 Oldsmobile Omega was admitted into evidence at Keith's trial. Tr. 509-10. But Nancy Smathers, the eyewitness to the getaway car, never identified the picture of the Omega as the car she saw. *See* Tr. pp. 379-402. The car that she described to the police was "a light colored car, cream colored." Tr. 388. The Omega was described as green

or gray. Tr. 448, 509. Further, Smathers said she saw a *two door* car with *no moulding* and a back window that *went straight down to the trunk.* The Omega had four doors, moulding, and a the back window that slants down to the trunk.

Forensic expert G. Michelle Yezzo also did not match the car to the tire tracks at the scene. Yezzo compared "an enlargement [of the tire brochure] on the copy machine, the Triumph 2000 tire ... I found to be *similar in tread design* to the plaster cast and also to the photographs from the crime scene." Yezzo deposition, p. 14 (emphasis added). "Similar in tread design" is by no means a forensic match. And there was no testimony as to how many other tires would also be "similar in tread design."

The State has further relied on a bullet casing that was conveniently found "outside the entrance road of the local General Electric plant, where Keith had picked up another girlfriend from work on the night of the murders." Opp. at 3. The speculation was that the casing was inadvertently carried on the shooter's clothing away from the crime scene. Tr. 854. But Keith picked up his girlfriend at 11 p.m. that night, two hours after the murders. Tr. 410. Surely, the shooter would not still have been wearing the same clothing in which he shot up an apartment; even if he had, it is difficult to imagine how the casing could have been inadvertently carried on his clothing for that long.

CONCLUSION

The lower court did not properly consider the materiality of this new evidence, which could very well lead to Ohio's execution of the wrong man. Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix 1: Handwritten Notes [000106-0000111] (fold-out exhibit) 1a

APPENDIX 1

Handwritten Notes
[000106-0000111]

[see fold-out exhibit, next 6 pages]

Attn: Capt Carver

Here are the papers Rick wrote in the intensive care ward. If you need anything else please call.

Pam Warren

317-322-3353 until 3:

5 pgs including Cover.

5-12-94 - @ 9.50 PM Philip

Philip Warren - Richard

Philip saw Richard @ Hospital Grant
Mon 14th approx 9AM. -

Had surgery - still had respirator
tubes in nose.

~~- asked Richard ---~~

- asked Richard if he knew who did
this & shook his head yes

- ~~Had~~ then wrote name Kevin on
paper.

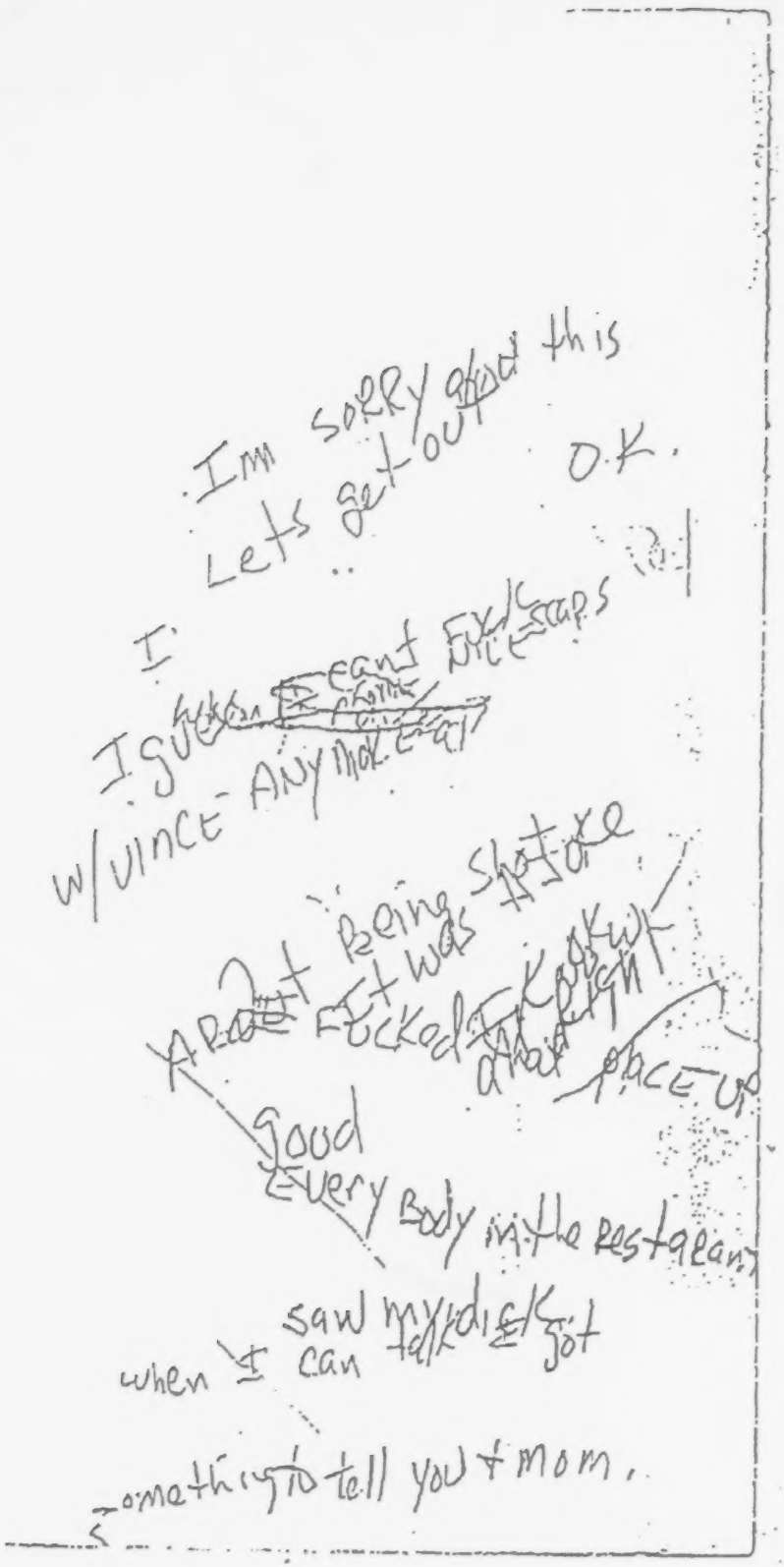
- asked if new last name
- shook his head no
- asked if he would know it if
heard it
- shook his head no

- Still have paper w/ Kevin on it

- Can Call wife @ 317 (work)
322-3353
"PAM" 8:30-4PM.
Home by 5PM. (6 my time)

~~FAX~~ FAX TO Police Dept.

BEST AVAILABLE COPY


Im sorry about this
Lets get out
O.K.
I
I guess
can't
w/ VINCE - ANY
2+ being
Shot
was
Good
Every Body in the restaurant
saw my
got
something to tell you + mom.

do it again

I think breathly
when are they gonna
will it hurt tim
like what

see
what is C-PAP
I feel like I'm
How does it's better
Breath
what can I say
w/out machine

THANX

Call the Police

I FEEL it HOT FOR JUSTICE

GSK IDFodt Sloop

IF it's OK

All Right my BROTHER

that this is too

my Left sid is Fucked up Tight

BSO Im ALRIGHT NOW

Capt. Stanley -

KEVIN -

DAMON - FRIEND

Eileen Can I Borrow your Typewriter Sometime

Bucyrus Police PD

419 - 562 - 1006